

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE TERRELL MOORE,

Defendant-Appellant.

UNPUBLISHED

June 12, 2007

No. 268465

Oakland Circuit Court

LC No. 05-202583-FC

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, larceny in a building, MCL 750.360, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b, and acquitted of the alternative, lesser charge of second-degree murder, MCL 750.317, and a connected charge of felony-firearm. The trial court sentenced defendant to life imprisonment for the murder conviction, 6 to 40 years' imprisonment for the felon in possession conviction, 3 to 15 years' imprisonment for the larceny conviction, and two years' imprisonment for each felony-firearm conviction. He appeals as of right. We affirm.

I Voluntariness of Confession

Defendant first contends four days of prolonged interrogation and mental instability rendered his custodial statements involuntary. He filed a motion to suppress, which the trial court considered and denied at a *Walker*¹ hearing on the first day of trial.

We review a trial court's factual findings related to a motion to suppress for clear error. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). In conducting that review, we give deference to the trial court's determinations regarding witness credibility. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). We review de novo underlying constitutional and legal questions, such as whether a statement was voluntary. *Id.* at 629-630.

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

To admit a confession in its case in chief, the state bears the burden of proving that the confession was voluntarily given by the defendant, thereby fulfilling the due process guarantee of the Fourteenth Amendment In addition, if the confession was the result of custodial interrogation, the state must prove that the police properly informed the defendant of his *Miranda*² rights and obtained a valid waiver. [*People v Cheatham*, 453 Mich 1, 13; 551 NW2d 355 (1996) (footnote added).]

The record clearly shows that police properly informed defendant of his *Miranda* rights. To establish that a defendant's waiver of his or her *Miranda* rights was valid, the prosecution must show that the waiver was "voluntary, knowing, and intelligent." *Daoud, supra* at 633. To be voluntary, a defendant's waiver must be "a free and deliberate choice," not forced by "intimidation, coercion, or deception." *Id.* To be knowing and intelligent, the defendant must be fully aware of "the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* When determining whether a defendant's *Miranda* waiver was valid, the court must look at the "totality of the circumstances," including the defendant's "age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his [*Miranda*] rights, and the consequences of waiving those rights." *Id.* at 634, quoting *Fare v Michael C*, 442 US 707, 725; 99 S Ct 2560; 61 L Ed 2d 197 (1979).

The test for determining whether a defendant made a statement voluntarily is very similar to the test for determining whether a waiver was valid.

The test of voluntariness should be whether, considering the totality of all the surrounding circumstances, the confession is "the product of an essentially free and unconstrained choice by its maker," or whether the accused's "will has been overborne and his capacity for self-determination critically impaired" The line of demarcation "is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession"

In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed. 2d 694 (1966).

The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [*People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988).]

At the time defendant made his custodial statements, he was 36 years old and had earned a GED. He had an extensive history of contact with law enforcement and had been convicted of three prior felonies. Accordingly, defendant was of sufficient age, education, and experience to understand his rights. Defendant was questioned in one to three hour blocks over three days by two different police officers. All the interrogations occurred during daytime hours and defendant was provided with meals at the proper times while being questioned. We conclude that defendant was not coerced into confessing given the span of time over which he was questioned. See *People v Hangsleben*, 86 Mich App 718, 727; 273 NW2d 539 (1978).

Defendant contends that he was too mentally unsound to give a voluntary statement. Specifically, he claims that he suffered from cocaine withdrawal symptoms and mental illness for which he was not timely given antidepressant and antipsychotic medications, and that Ferndale police officers physically abused him and bruised his ribs.

Police coercion may be both psychological and physical. *People v DeLisle*, 183 Mich App 713, 721; 455 NW2d 401 (1990), app after rem *People v DeLisle*, 202 Mich App 658; 509 NW2d 885 (1993), aff'd *DeLisle v Rivers*, 161 F 3d 370 (CA 6, 1998), cert den 526 US 1075; 119 S Ct 1476; 143 L Ed 2d 559 (1999).³ In *DeLisle*, *supra* at 715-716, the defendant was taken from Wyandotte to Lansing for a polygraph examination between 7:00 and 7:30 a.m. on August 9, 1989. He was interrogated for more than two-and-a-half hours, given less than a one hour break for lunch, and was questioned for an additional four hours. The defendant was arrested 11 hours after he was taken into custody and was then taken to the Wyandotte police station. After being placed in a holding cell from 7:30 p.m. until 10:45 p.m., officers again interrogated the defendant until 1:00 a.m. During this late night interrogation, the defendant made several inculpatory statements. In conducting this interrogation, the police officers relied upon the advice of a psychologist and used information relating to the defendant's father's suicide to elicit information. *Id.* at 717. As a result of this interrogation technique, a family member testified that the defendant began hallucinating and shouting at his dead father. *Id.* at 717-718.

In this case, defendant failed to present evidence supporting his assertions contained in the motion to suppress, the motion for a *Ginther*⁴ hearing based on counsel's inadequate performance in relation to the motion to suppress, or on appeal. Defendant had access to psychological evaluation reports from the Forensic Center and from his appointed expert witness, yet never requested his medical records and alleged photographs of injuries from the Oakland County Jail. Defendant was given the Ferndale police department's medication log

³ Although there is significant appellate history in the *DeLisle* case following the 1990 opinion, this Court's determination regarding the suppression of the defendant's statement remains intact.

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

during discovery, but never presented that document into evidence. Absent evidence that defendant was psychologically coerced or physically harmed, defendant has not established that he was incapable of understanding his *Miranda* rights or that his statements were the product of police coercion. Accordingly, defendant's challenge to the denial of his motion to suppress lacks merit.

II Weight of the Evidence

Defendant next contends that because his confession to the murder was involuntary and improperly admitted, his convictions were against the great weight of the evidence. Defendant preserved his challenge to his conviction by filing a motion for a new trial based on the weight of the evidence, which the trial court denied *People v Harding*, 443 Mich 693, 736; 506 NW2d 482 (1993). We review a trial court's denial of a motion for new trial for an abuse of discretion. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 832 (2003). "The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). However, neither the trial court nor this Court may interfere with the jury's determination regarding conflicting evidence and witness credibility. *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998).

As discussed *supra*, the trial court properly determined that defendant's custodial statements were voluntary and, therefore, admissible at trial. Defendant confessed that he shot Abdallah four to five times and instructed his accomplice, Jonathan Lamont Welch, to shoot Abdallah. This statement is consistent with the evidence that Abdallah was shot six to seven times. Defendant also admitted to stealing Abdallah's mixing board from the recording studio immediately following the shooting. Although defendant's blood was not found on the scene, the investigating officers found Welch's blood and defendant admitted that Welch was present during the shooting.

Further, the trier of fact may determine a defendant's guilt based on circumstantial evidence and reasonable inferences drawn from that evidence. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Defendant's fingerprint was found on a beer can located in the studio. Abdallah's friend, Dan Hess, and defendant's ex-wife, Kathleen Hurley, both testified that the beer can was not in the studio prior to the shooting. There were no cans of beer in Abdallah's refrigerator and no other discarded beer cans anywhere in the studio. The jury could infer from this evidence that defendant left the beer can in the studio on the day of the murder. Defendant's business card was found in the studio. Moreover, defendant confessed to being in the studio with Welch on the day of the murder. The police did not tell defendant that Welch's blood had been found on the scene before defendant made that confession. It was reasonable for the jury to infer defendant's guilt based on his independent corroboration of nondisclosed facts regarding the crime scene. It was also reasonable to infer that defendant was the individual who had stolen the mixing board and attempted to sell it given his other connections to the crime scene. Accordingly, we find that the evidence does not preponderate against the jury's verdict and the trial court properly denied defendant's motion for a new trial on this basis.

III Prosecutorial Misconduct

Defendant also contends that the prosecutor engaged in misconduct by appealing to the jury's sympathy for the victim, Abdallah, and by presenting inadmissible evidence regarding defendant's aliases. Defendant failed to preserve his challenges to the prosecutor's purportedly improper comments and actions by raising timely objections. *Carines, supra* at 763-764. Generally, we review prosecutorial misconduct claims on a case-by-case basis, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). To the extent that this challenge is unpreserved, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

Defendant raises several challenges to the prosecutor's questions to witnesses and statements during closing arguments to support his claim that the prosecutor improperly appealed to the jury's sympathy for the victim. The prosecutor elicited testimony from Hess that Abdallah was a multitalented musician and producer. The prosecutor then elicited testimony regarding Hess's activities with Abdallah during the week prior to the murder, including their activities in Abdallah's recording studio on January 1, 2005. Vincent Muscillo, a friend and business associate of Abdallah, testified that he and Abdallah were "good friends" and that Abdallah "was a really nice guy" who helped his band by exchanging recording time for labor rather than cash. The prosecutor began his closing argument by describing Abdallah as a musician who used his "tremendous talents" to assist "young budding musicians." The prosecutor stated that Abdallah invited young musicians into his home, not just his studio.

It is improper for a prosecutor to appeal to a jury's sympathy for a victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). However, a prosecutor is free to argue the evidence and all reasonable inferences arising from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Here, the prosecutor properly elicited testimony from Hess regarding his and Abdallah's activities prior to the murder. This testimony was highly relevant to establish Hess's knowledge regarding the state of the studio prior to the murder. Specifically, Hess testified that there were no beer cans in the studio on January 1, 2005. Hess testified that he would have noticed any containers of liquid in the vicinity because Hess had brought over some expensive keyboard equipment that could have been damaged in the event of a spill. While testimony regarding Abdallah's friendly personality and reputation in the music business was not particularly relevant to determine whether defendant had committed the charged offenses, the isolated and short remarks by Muscillo and the prosecutor did not render the trial unfair or affect its outcome.

Defendant also challenges the prosecution's use of his aliases during his trial. During the first and second day of jury selection, the prosecutor read the general information to the jury venire, including the fact that defendant is "also known as Tom, also known as Terry Maddog 13." When the trial court asked the potential jurors whether they could presume a defendant innocent until proven guilty, one juror indicated that he believed that the police "do a pretty good job of getting their man" The court asked if the juror had any information directly related to defendant. The juror indicated that defendant's "name is Maddog with a number 13 tattooed on his forehead [I]t just seems to kind of put it in a bad light right off the start" After hearing a speech from the court regarding the presumption of innocence, the juror asserted that he would not be able to put aside his initial reaction and hold the prosecutor to his burden of proof. As a result, the court removed that juror for cause.

This Court has noted that there is a split in authority regarding whether the prosecution may use a defendant's alias to impeach his or her credibility. *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996), citing *People v Pointer*, 133 Mich App 313, 316; 349 NW2d 174 (1984). However, evidence of a defendant's alias is admissible where it is relevant to establish identity. *Id.* In this case, evidence of defendant's alias "Terry Maddog 13" was directly relevant to identify defendant and connect him to the charged offenses. Defendant's business card from "Maddog Records" was found at the scene. Defendant confessed that he instructed Welch to shoot Abdallah to prove his loyalty as a "Maddog" killer. Muscillo testified that a man with the number 13 tattooed on his forehead came into Abdallah's studio on New Year's Eve. Derek Williams testified that a man with the number 13 tattooed on his forehead came into Zieman's pawnshop on January 3, 2005, and tried to sell a stolen mixing board. A prosecutor does not engage in misconduct when making a good faith effort to have evidence admitted at trial. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). Accordingly, we find that defendant's challenge to the use of his aliases at trial lacks merit.

IV Effective Assistance of Counsel

Finally, defendant contends that he received ineffective assistance of counsel. Defendant preserved his challenge by filing a motion for a new trial or *Ginther* hearing based on the ineffectiveness of counsel at trial. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Because the motion was denied and the hearing was not conducted, our review is limited to the facts on the record. *Id.*

Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. A judge must first find the facts and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575; 640 NW2d 246 (2002). [*People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003), rem by 388 F Supp 2d 789 (ED Mich, 2005).]

We review a trial court's findings of fact for clear error, MCR 2.613(C), and conclusions of constitutional law de novo, *LeBlanc, supra* at 579. Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant contends that trial counsel was ineffective for failing to properly investigate his alibi defense and for failing to call potential alibi witnesses. Trial counsel has a duty to reasonably investigate his or her client's case and to make strategic decisions based on that reasonable investigation. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). Decisions regarding what evidence to present and whether to call or question potential witnesses are matters of trial strategy that this Court will not judge with the benefit of hindsight. *Rockey, supra* at 76. Trial counsel's failure to call or question potential witnesses amounts to ineffective assistance only when it deprives defendant of a substantial defense, i.e., one that may have led to a different outcome at trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990); *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

At the hearing on defendant's motion for a *Ginther* hearing, defendant's appellate counsel admitted that he had contacted the potential alibi witnesses named by defendant. However, he noted "none of them provided anything that [he] could put into the form of an affidavit." It appears that these witnesses would not have provided testimony at trial that would have been helpful to the defense. If defense counsel failed to investigate defendant's potential alibi defense, that error would not have been outcome determinative such that a new trial would have been required. In any event, defendant has named only one of the potential alibi witnesses and has supplied no affidavits describing their testimony in any detail. Absent this information, defendant is unable to overcome his burden of proof that the failure to call and question these witnesses was sound trial strategy.

Defendant also contends that trial counsel failed to adequately support and argue the motion to suppress his custodial statements. Contrary to defendant's argument on appeal, it appears that trial counsel investigated whether to challenge the voluntariness of defendant's confession to the police based on mental illness. As noted *supra*, an independent examiner with the Forensic Center conducted a psychological evaluation and trial counsel requested the appointment of a defense expert to examine defendant. Although an independent examination was conducted and defendant allegedly had preexisting, prediagnosed mental conditions, defendant's appellate counsel failed to present any medical records to support this claim in the motion for new trial in the trial court. Accordingly, we presume that there are no medical records or psychological evaluations that would assist the defense to establish that defendant was coerced into making a confession while in a mentally impaired state.

Defendant claimed that officers with the Ferndale Police Department "abused" him while he was in custody. Defendant asserted that Oakland County Jail possessed photographs and medical records establishing that he suffered bruised ribs as a result of this treatment. Again, appellate counsel failed to produce these records before the trial court in arguing the motion for a *Ginther* hearing. Defendant also claimed that the Ferndale Police Department had not given him his prescription medication during the period of his interrogation. As noted *supra*, it appears from the record that the prosecutor provided defense counsel with the "prisoner medication dispense log." However, because neither trial nor appellate counsel relied on this log while in the trial court, defendant cannot now prove that the log indicates that defendant was not given his medication on a regular basis.

Finally, defendant challenges trial counsel's failure to object to the various instances of alleged prosecutorial misconduct during voir dire and trial. However, as noted *supra*, the prosecutor's comments and questions did not amount to misconduct. Counsel is not required to raise futile or meritless objections and the failure to do so does not amount to ineffective assistance. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Accordingly, trial counsel was not required to raise an objection in this case.

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen Fort Hood